IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:02-CR-80-H
No. 5:13-CV-463-H

JAMES SCOTT ROBINSON, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	))))))))	MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby submits this memorandum in support of its motion to dismiss Petitioner's 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence.

BACKGROUND

The Government filed a 28-count juvenile information on March 19, 2002, charging Petitioner with conspiracy, armed bank robbery, attempted bank robbery, firearms and Hobbs Act offenses in connection with eight armed robberies and one attempted robbery which occurred when Petitioner was 15 and 16 years old. [D.E. 1]. The Government also filed a juvenile certification. [D.E. 2].

Pursuant to the District Court's order, both the Government and Petitioner filed motions for a psychological evaluation of Petitioner. [D.E. 10, 16]. The Government also filed a motion for discretionary transfer to District Court so that Petitioner could be prosecuted as an adult. [D.E. 11].

Honorable Judge Malcolm J. Howard held a hearing to determine whether Petitioner was competent to stand trial and whether to transfer him to District Court to be tried as an adult. After the hearing, the Court determined Petitioner was competent and granted the Government's motion to transfer Petitioner to District Court to be prosecuted as an adult. [D.E. 46].

Petitioner subsequently was charged in a 20-count indictment, as follows:

Counts One, Five, Eight	conspiracy (18 U.S.C. § 371)
Counts Two, Six, Nine	armed bank robbery, aiding and abetting (18 U.S.C. §§ 2113(a), (d) and 2)
Counts Three, Seven, Ten, Twelve, Sixteen, Twenty	brandishing a firearm during and in relation to a crime of violence, aiding and abetting (18 U.S.C. §§ 924(c)(1)(A)(ii) and 2)
Count Four	attempted bank robbery, aiding and abetting (18 U.S.C. §§ 2113(a) and 2)
Counts Eleven, Thirteen, Fifteen,	interfering with commerce by robbery, aiding and abetting

Seventeen, Nineteen	(18 U.S.C. §§ 1951 and 2)
Counts Fourteen, Eighteen	discharging a firearm during and in relation to a crime of violence, aiding and abetting (18 U.S.C. §§ 924(c)(1)(A)(iii) and 2)

[D.E. 47].

On October 14, 2003, Petitioner pled not guilty to the indictment. The District Court later dismissed Count Four upon motion of the Government. At the conclusion of the trial, the jury returned guilty verdicts on all remaining counts. [D.E. 73].

On May 4, 2004, the District Court sentenced Petitioner to an aggregate 384-term of imprisonment, as follows:

Count Three	83 months (consecutive to the sentences for all other counts)
Counts Seven, Ten, Twelve, Fourteen, Sixteen, Eighteen, Twenty	300 months, each count (concurrent with one another and consecutive to the sentence on Count Three)
Counts One, Five, Eight	60 months, each count (concurrent with the sentences for all counts except Count Three)
Counts Two, Six, Nine, Eleven, Thirteen, Fifteen, Seventeen, Nineteen	135 months, each count (concurrent with the sentences for all counts except Count Three)

[D.E. 70]. The Court also imposed an aggregate five-year term of supervised release and ordered Petitioner to pay $31,104.00 in restitution. Id.

Both Petitioner and the Government each filed a timely notice of appeal. [D.E. 80, 81]. Petitioner appealed his convictions and sentence and the Government appealed the District Court's granting of a downward departure. On April 18, 2005, the Fourth Circuit affirmed Petitioner's convictions but reversed his sentence and remanded for re-sentencing holding that the District Court erred in sentencing Petitioner below the statutory minimum. [D.E. 89, 91].

At the second sentencing hearing the District Court re-sentenced Petitioner in accordance with the statute and imposed a term of 193 years and three months' imprisonment. [D.E. 97]. Petitioner again appealed his sentenced and his attorney filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). [D.E. 98]. The Fourth Circuit affirmed the judgment of the District Court on November 3, 2006. [D.E. 104].

On June 25, 2013, Petitioner filed the instant petition to vacate his sentence under 28 U.S.C. § 2255. [D.E. 109]. Petitioner asserts that he was only 13 years old[1] when he committed the crimes for which he was convicted and sentenced to

[1] Contrary to Petitioner's assertion, the facts establish that Petitioner was ages 15 and 16 at the time of the offenses.

193 years and 3 months and that his age at the time of the offenses as well as his limited mental capacity entitles him to a proportionality review because he effectively received a life sentence. For the reasons stated below, Petitioner's motion should be dismissed.

STATEMENT OF FACTS

On October 28, 2000, Petitioner (age 15) and Anthony Sanders robbed a Food Lion grocery store in Clayton, North Carolina. Petitioner and Sanders were armed with handguns and wearing ski masks. They went to the office area, demanded money, and received approximately $3,000.00 in cash and $3,000.00 in checks.

On December 20, 2000, at approximately 8:00 p.m., Petitioner (age 15), wearing a ski mask, entered the Piggly-Wiggly in Smithfield, North Carolina. Petitioner fired a gun up into the air, leaving a bullet hole in the ceiling. Petitioner then walked up to the cash office window, stuck the gun through the office window, and demanded money. After Petitioner received approximately $800.00, he fled the store.

On December 27, 2000, Kenneth Horne and Sanders drove Petitioner (age 16) to Smithfield, North Carolina where Petitioner entered Four Oaks Bank, located in Smithfield, North Carolina. Petitioner was wearing a ski mask and was armed with a handgun. Petitioner cocked his gun towards the teller's face, and threatened to kill her. After the teller gave Petitioner money from her teller drawer, Petitioner demanded money from a second teller. That teller, too, gave Petitioner money from her drawer. Petitioner fled the bank with approximately $16,000.00.

On January 10, 2001, Petitioner (age 16), Horne, and Sanders decided to rob a Food Lion store in Wilson, North Carolina. The three of them went to Wilson, and Petitioner, who was in a ski mask, entered the Food Lion armed with a handgun. Petitioner banged on the door of the office with the gun and demanded to be let inside the office. Once inside the office, Petitioner demanded money. After receiving some money, Petitioner demanded money from the safe. As Petitioner was walking to the safe, he was pointing the gun at the victim's head. In the process of getting the money from the safe, the doors of the safe closed, and Petitioner was not able to open the door. Petitioner then fled the store with approximately $2,000.00.

Officer Eddie Edwards with the Wilson Police Department responded to the scene two to three minutes later. Officer Edwards saw a person later identified as Petitioner less than a block away from the Food Lion. In response to Officer Edward's questions, Petitioner stated his name was Junior Crisp, and he gave the officer the address where he lived with his grandmother. Petitioner agreed to be escorted to the Food Lion for a “show up.” The employees at the Food Lion were not able to identify Petitioner as the robber. Officer Edwards transported Petitioner back to the apartment complex, released him, and, then, turned over the information he gathered from Petitioner to the investigating officer, Detective Jerome Bass with the Wilson Police Department.

Detective Bass conducted a follow-up investigation and secured an arrest warrant for Petitioner and went to Petitioner’s home to serve the warrant. Petitioner and his grandmother consented to Detective Bass searching their home. After the search was completed, Officer Bass read Petitioner his Miranda rights and transported him to the Wilson Police Department.

On May 25, 2001, Petitioner (age 16) traveled to Smithfield, North Carolina to rob a Food Lion. Petitioner, with a hood over his face, entered the Food Lion armed with a gun and demanded money from the safe. After Petitioner received the money, he fled from the store. As Petitioner was fleeing, a store employee chased Petitioner behind the Food Lion, where Sanders, Horne, and Groves were waiting for Petitioner. Before Petitioner entered the car, he turned around, pointed the gun at the employee, and then shot into the air. Petitioner, Horne, Sanders, and Groves fled from the area.

On June 1, 2001, Petitioner (age 16), Sanders, and Travis Groves drove Horne’s car to Garner, North Carolina. Petitioner, armed with a handgun and wearing a mask, entered the Dixie Construction Company, which was located in the Bank of America building in Garner. Petitioner grabbed the employee by her arm, put a gun to her back, and forced her into a hallway that separates the construction company and the bank. That door is secure, however, and the bank cannot be entered through it. Petitioner forced the victim to exit the building and enter the front door of Bank of America. Petitioner pointed the gun at the bank tellers and told them to hold up their hands. Petitioner threw a pillowcase at one of the tellers and told her to fill it with money. The tellers complied with Petitioner's demand. One of the tellers gave Petitioner a dye pack. Petitioner received the money and he ran out of the bank with $13,226.00. As he fled, the dye pack exploded. Petitioner dropped the pillowcase in the woods and got in the car with Groves and Sanders.

On August 18, 2001, Petitioner (age 16), Sanders, and Groves saw a Food Lion in Fuquay-Varina. Petitioner and Sanders went inside the Food Lion, armed with guns, and demanded money. An employee opened the safe and Petitioner and Sanders took the money from the safe and put it in a bag. After they got the money, they fled the store with approximately $2,000.00, which they divided.

On August 21, 2001, Petitioner (age 16), Sanders, and Groves decided to rob the First Citizens Bank in Smithfield, North Carolina. Petitioner left the car and entered First Citizens Bank. Petitioner was wearing a hood that obscured his face. He pointed a gun at a teller and demanded money. Petitioner gave the teller a pillowcase in which to put the money. The teller complied with Petitioner's demand, and Petitioner fled the bank with thousands of dollars.

As Petitioner fled the bank, a witness followed him and called 911. The witness informed officers that Petitioner had gone to an apartment complex. Based on the information provided by the witness, plain-clothed law enforcement officers drove an unmarked vehicle toward the apartment complex. A car occupied by two persons pulled in front of them. The car and its occupants drew the officers' attention, because they were traveling below the speed limit, and the occupants repeatedly looked to the left and right. Suspecting that the car's occupants might be involved with the bank robbery, the officers followed it to the apartment complex where Petitioner had gone. There, they saw the two men exit the car and enter an apartment. The officers watched the apartment and then knocked on the door. Once inside the apartment, they saw Petitioner, Groves, and Sanders. Officers received permission from the owner of the apartment to search the apartment. Clothing that Petitioner had worn during the robbery, as well as the pillowcase and money, were located.

Petitioner, Groves, and Sanders were arrested and taken to the Smithfield Police Department. Once they arrived, they were interviewed separately. Prior to Petitioner's interview, he was advised of his juvenile Miranda rights. The officers had no trouble communicating with Petitioner, and Petitioner stated he understood what was being said to him. After being advised of his rights, Petitioner agreed to answer questions. Initially, Petitioner denied involvement in the bank robbery, but after being told that Sanders and Groves had implicated him in the robbery, Petitioner admitted his participation.

During the course of the interview, Petitioner admitted to participating in the August 18, 2001, Food Lion robbery in Fuquay-Varina[2]; the December 20, 2000, Piggly Wiggly robbery in Smithfield; the December 27, 2000, Four Oaks Bank robbery in Smithfield; and the June 1, 2001, Bank of America robbery in Garner.

[2] After the defendant admitted to this robbery, officers from Fuquay-Varina interviewed him. Prior to the interview, they advised the defendant of his juvenile Miranda rights. The defendant stated that he understood his rights and agreed to answer questions. The defendant admitted to the officers that he was involved in the Food Lion robbery.

ARGUMENT

In his § 2255 motion, Petitioner claims that he is entitled to a proportionality review of his sentence of 193 years and three months, comprised of eight 18 U.S.C. § 924(c) convictions and eleven other robbery related convictions. Petitioner further argues that, upon review, his sentence should be vacated as unconstitutional in light of Graham v. Florida, 130 S. Ct. 2011 (2010), and Miller v. Alabama, 132 S. Ct. 2455 (2012).

1. Petitioner's Motion is Untimely

This Court does not have jurisdiction to hear the claims presented in Petitioner's § 2255 motion because the motion is untimely. Under amendments to § 2255 in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Petitioner had one year to file a motion challenging his conviction or sentence from "the date on which [his] judgment became final." 28 U.S.C. § 2255(f)(1). Petitioner's federal conviction became final on approximately February 3, 2007, the date his time to petition for certiorari expired. He did not file this motion to vacate until June 25, 2013; over six years after the one-year statute of limitations imposed by the AEDPA expired.

Further, Petitioner does not get the benefit of 28 U.S.C. § 2255(f)(3) which allows petitions to be filed within one year after "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized . . . and made retroactively applicable to cases on collateral review." See also United States v. Powell, No. 11-6152, 2012 WL 3553630 (4th Cir. Aug. 20, 2011). Petitioner first directs the Court to the July 6, 2010 Supreme Court opinion in Graham v. Florida, 130 S. Ct. 2011. However, Petitioner completely failed to file his § 2255 motion within one year of Graham. In fact, Petitioner waited almost three years after Graham to file his § 2255 motion. Accordingly, any claim for relief under Graham should be dismissed as untimely.

Petitioner next directs the Court to the June 25, 2012 Supreme Court opinion in Miller v. Alabama, 132 S. Ct. 2455. Although Petitioner filed his § 2255 motion within one year of Miller, the Miller opinion has absolutely no applicability to Petitioner's case. Miller simply extended the rule in Graham to ban mandatory life imprisonment without parole for juveniles in homicide cases. 132 S. Ct. at 2457-58. The facts in Petitioner's case differ considerably from the facts in Miller: (1) Petitioner was only convicted of non-homicide offenses; (2) the statutes Petitioner violated did not *mandate* life imprisonment without parole; and (3) Petitioner was not sentenced to life imprisonment without parole. Petitioner's § 2255 motion improperly attempts to raise an untimely claim for relief under Graham by couching that claim under the inapplicable but more recent Supreme Court decision in Miller.

Petitioner's § 2255 motion should be dismissed in its entirety as untimely.

2. In the Fourth Circuit, Petitioner is not entitled to proportionality review of his term-of-years sentence.

In his § 2255 motion, Petitioner claims that he is entitled to proportionality review of his sentence based on Graham and Miller. Graham and Miller explicitly recognize the importance of proportionality review in cases where a juvenile is sentenced to life without parole. 130 S. Ct. at 2021, 132 S. Ct. at 2463, respectively. Petitioner, however, was not sentenced to life without parole; he was sentenced to multiple consecutive sentences for his 18 U.S.C. § 924(c) convictions.

In the Fourth Circuit, Petitioner's sentence consisting of multiple consecutive sentences is not considered life imprisonment without parole. See United States v. Cox, No. 11-4620, 2012 WL 453612, at *2 (4th Cir. Feb. 14, 2012) (four consecutive 300 month sentences was not reviewable on appeal because defendant was not in fact sentenced to life imprisonment without possibility of parole); see also United States v. Khan, 461 F.3d 477, 495 (4th Cir. 2006) (consecutive sentences mandated by § 924(c), "even if it might turn out to be more than the reasonable life expectancy of the defendant," do not violate the Eighth Amendment). "'[P]roportionality review is not available for any sentence less than life imprisonment without the possibility of parole.'" Cox, 2012 WL 453612, at *2 (quoting United States v. Ming Hong, 242 F.3d 528, 532 & n.3 (4th Cir. 2001)). As the Fourth Circuit already recognized on direct review of Petitioner's case, Petitioner is not entitled to proportionality review of his sentence and his § 2255 motion should be dismissed. [D.E. 104].

3. Petitioner is not entitled to relief under Graham v. United States.

To the extent this Court looks at whether Petitioner is entitled to relief under Graham, he is not. "The Supreme Court in Graham specifically limited its holding to [only] juvenile offenders . . . who did not kill, and were sentenced to life imprisonment without parole." Deyton v. Keller, Nos. 1:10-cv-127, 1:10-cv-128, 1:10-cv-128, 2010 WL 7633922, at *15 (W.D.N.C. Nov. 1., 2010) (citing Graham, 130 S. Ct. at 2023). Petitioner is a juvenile offender who did not kill, and he was not sentenced to life imprisonment without parole. Petitioner was sentenced to one 7-year sentence, seven 25-year sentences, and a 135 month sentence, all to be served consecutively. These sentences corresponded to 19 different convictions.

Whether Petitioner's multiple sentences amount to the practical equivalent of life without parole, as Petitioner suggests, is irrelevant. Graham "does not clearly establish that consecutive fixed-term sentences for juveniles who have committed multiple non[-]homocide offenses are unconstitutional." Bunch v. Smith, 685 F.3d 546, 550 (6th Cir. 2012) (holding that imposition of multiple, consecutive sentences on a juvenile offender, amounting to 89 years, did not violate clearly established federal law under Graham). In Bunch, the Sixth Circuit recognized that "no federal court has ever extended Graham's holding beyond its plain language to a juvenile offender who received consecutive, fixed-term sentences." Similarly, in Chappell v. McEwen, the Central District of California declined to extend Graham to multiple, consecutive, fixed-term sentences until the Supreme Court so recognizes. No. 12-cv-3252, 2013 WL 1870748, at *2 (C.D. Cal. May 3, 2013). Further, within the Fourth Circuit, the Western District of North Carolina held that Graham did not apply to Petitioners who were sentenced to multiple consecutive sentences for multiple charges that they argued amounted the "de facto life sentences" because they were not sentenced to life without parole. Deyton, 2010 WL 7633922, at *15. Accordingly, Petitioner's claim for relief under Graham should be dismissed for failure to state a claim upon which relief may be granted.

To the extent Petitioner still claims that his sentence is unconstitutional, "there is no case law to support the proposition that if a person commits multiple, serious violent offenses . . . , the [E]ighth [A]mendment prohibits a court from punishing each offense." Deyton, 2010 WL 7633922, at *15. "[L]engthy, mandatory sentences imposed pursuant to the 'count-stacking' provision of § 924(c) do not violate the Eighth Amendment." United States v. Matthews, No. 08-4508, 2008 WL 4963384, at *1 (4th Cir. Nov. 20, 2008) (quoting Khan, 461 F.3d at 495). Petitioner § 2255 should be dismissed.

CONCLUSION

WHEREFORE, Petitioner's 28 U.S.C. § 2255 Motion to Vacate, Set Aside or Correct Sentence should be dismissed in its entirety for lack of jurisdiction or for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(1), Fed. R. Civ. P. 12(b)(6).

Respectfully submitted, this 4th day of September, 2013.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 4th day of September, 2013, served a copy of the foregoing upon the counsel for the petitioner in this action by electronically filing the foregoing with the Clerk of court, using the CM/ECF system which will send notification of such filing to:

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